2011 IL App (4th) 110487-U

Filed 12/29/11

NO. 4-11-0487

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

In re: the Estate of VERNON KAUFMAN, Deceased, HAZEL KAUFMAN, Petitioner-Appellant, v. HERBERT KAUFMAN and KRISTINE R. FRESHOUR, Individually and as Coexecutors of the Estate of VERNON KAUFMAN, Deceased; WYNNE FRIEDMAN; and AMY HUMPHRIES, Respondents-Appellees.	)	Appeal from Circuit Court of McLean County No. 09P105 Honorable Stephen R. Pacey, Judge Presiding.

JUSTICE APPLETON delivered the judgment of the court.
Justices Steigmann and McCullough concurred in the judgment.

ORDER

¶ 1 *Held*: Where the statement made by the decedent's wife did not qualify as an admission as to the decedent's testamentary intent, the trial court did not err in entering a judgment for defendants after a bench trial. The preponderance of the evidence did not demonstrate that decedent had intended to establish a trust for plaintiff personally, rather than for plaintiff's descendants.

¶ 2 In 2001, decedent, Vernon Kaufman, executed his last will and testament. In the will, he specified that the majority of his estate, including the family farm, be divided among his four children, defendants Herbert Kaufman, Kristine R. Freshour, Wynne Friedman, and Amy Humphries. These were Vernon's four children with his second wife, Karin Kaufman. Vernon was married previously to Gladys. Together they had a daughter, plaintiff Hazel Kaufman. In his will, Vernon did not include plaintiff with his other children. Instead, he established a trust in the amount of $100,000 for the benefit of plaintiff's descendants. Plaintiff sued her siblings, claiming her father

obviously did not understand the provisions of his will. Otherwise, he would have left her something in his will. After the March 2011 bench trial, the trial court disagreed with plaintiff and entered judgment in favor of defendants. We affirm.

¶ 3 I. BACKGROUND

¶ 4 In June 2001, Karin and Vernon each executed a will. Karin died in 2008. Vernon died in 2009. Upon his death, plaintiff realized Vernon had disinherited her from his estate. Was this intentional or an oversight? Plaintiff insisted it was an oversight and filed a lawsuit contesting the will.

¶ 5 Vernon's will provided for plaintiff's children and grandchildren by establishing a trust for their benefit. Vernon placed $100,000 into the "Hazel Kaufman Descendant's Trust" with Soy Capital Bank and Trust as trustee. The trustee was instructed to pay to plaintiff's children or grandchildren any amount deemed necessary for their care or support until the trust was depleted.

¶ 6 In August 2009, plaintiff filed her complaint against her four half-siblings contesting the validity of Vernon's will, alleging he most likely did not understand the contents of his will so as to knowingly disinherit plaintiff from his estate. Defendants filed a motion to dismiss pursuant to section 2-615 of the Code of Civil Procedure (735 ILCS 5/2-615 (West 2008)), asserting (1) Vernon indeed understood the provisions of his will, (2) Herbert Kaufman and Kristine Freshour should have been named as defendants in their capacities as coexecutors, and (3) plaintiff's children and grandchildren should have been named as necessary parties. Plaintiff amended her complaint to include the two siblings as named coexecutors. The trial court denied the remainder of defendants' motion.

¶ 7 In February 2011, plaintiff filed a third amended complaint. She added the allegation

that Vernon's belief that plaintiff did not do any work on the family farm was "an insane delusion." According to her, she had worked on the farm from spring 1962 through July 1963.

¶ 8 On March 3, 2011, the trial court conducted a bench trial. First to testify for plaintiff was Linda Wedwick, a professor in reading and literacy. In her opinion, based on "readability tests" of Vernon's will, the document was "difficult[,] particularly because of the sentence structure and length, making it complex syntactically." Assuming Vernon had an eighth-grade education and was able to read at an eighth-grade level, "this text would have been very difficult to understand, particularly because of the technical nature."

¶ 9 William Bach, the attorney who represented Vernon in different capacities throughout Vernon's life and who drafted the wills at issue, testified that, in his opinion, Vernon understood the provisions in his will, including that he would be providing for plaintiff's descendants, not plaintiff individually. Bach said Vernon did not specifically provide for plaintiff personally partly because he believed she may have been receiving government aid and he did not want to jeopardize that with her receipt of an inheritance.

¶ 10 According to Bach, in June 2001, he met with Vernon and Karin for the purpose of updating their 1994 wills. With both present, but Karin doing most of the talking, the couple indicated that they wanted to give "specific designated farmland to each one of [their] children." They also said they wanted to give plaintiff a cash gift of $100,000. However, Bach believed they eventually decided to establish a trust "rather than [an] outright gift because of the fact that there were certain questions in their mind[s] about [plaintiff's] ability to manage money and whether or not there had been any payments to [plaintiff] made under public aid or anything else that might be disqualified if she had some kind of a more active interest in this property." Bach prepared

substantially identical wills for Vernon and Karin in accordance with their desires articulated in their meeting.

¶ 11 Bach testified he was not aware that Karin had indicated to anyone, including the co-executor Freshour, that the wills established a trust for plaintiff's benefit. Referring to Vernon's and Karin's understanding of any provision for plaintiff, the following exchange occurred:

> "Q. Mr. Bach, did you ever explain to Karin and Vernon that the wills they signed on June 28th, 2001, disinherited Hazel Kaufman?
>
> A. I don't ever remember, we had a discussion what was to be in the so-called trust, I assume they knew that. I don't remember having a specific discussion about disinheritance or anything else. It was certainly to the benefit of her family.
>
> Q. But to answer my question, did you not say this will disinherits your daughter Hazel?
>
> A. Not that I remember.
>
> Q. It could have been put in the will, an explicit provision disinheriting Hazel, isn't that right?
>
> A. Yes."

¶ 12 Bach testified that in his previous 1994 will, Vernon had not made any provision for plaintiff. At that time, Bach had suggested to Vernon "that *inter vivos* gifts might be the best way to take care of whatever they wanted to do for her." When asked about Vernon's mental capacity to understand the terms of his will, Bach replied: "No, there wasn't any question in my mind. Whether

he understood all the legal ramifications of the terms he was talking about may be something else; but his general intent, I had no problem with that." He said he "certainly thought [Vernon] was competent to make a will."

¶ 13 Plaintiff next introduced the evidence deposition of Dr. Paul Nord, Vernon's physician for 30 years. Dr. Nord's opinion was that Vernon, who was born in 1912, would have generally understood the provisions of his will if those provisions were read or explained to him. Dr. Nord knew Vernon as "a farmer who handled land, who handled moneys, who took care of things, was very independent. He had a wife who was with him all the time. He seemed to understand things and I think that especially being a farmer who had dealt with buying ground, that he would be able to understand these types of things if they were indeed explained to him." Dr. Nord said in 2001, when the will was prepared, he considered Vernon to be "healthy."

¶ 14 Plaintiff testified on her own behalf. She was born in 1951 and was currently 59 years old. Vernon and her mother, Gladys, divorced when she was "a little child." She lived with her mother until she was taken from her custody at approximately age 10. An order adjudicating her a dependent minor was entered in 1962. Plaintiff lived with Vernon and Karin and their three children, at the time, on the farm. She worked on the farm "walking beans, feeding chickens, gathering eggs" while living there for approximately one year. She then moved in with one of her sisters for approximately one year. After that, she lived in the Salem Children's Home in Flanagan. She remained there for five years.

¶ 15 Plaintiff said Vernon visited her only "a couple times" during the five years. After she graduated high school, she moved into her own apartment in Bloomington. She visited Vernon and Karin "a couple times a month." She said she got along "pretty well" with Vernon and "very

good" with Karin. She considered Karin more of a mother to her than her own. Plaintiff, plaintiff's children, and her grandchildren always received gifts from Vernon and Karin.

¶ 16 On cross-examination, plaintiff testified that when her children were younger, she received public aid. She said her oldest child was 36 and her youngest was 25.

¶ 17 Herbert Kaufman, plaintiff's half-brother, testified next for plaintiff. Herbert was a coexecutor of Vernon's will. He said plaintiff had a good relationship with his parents but he would not describe plaintiff's relationship with Vernon as "close." Herbert and Vernon were partners in the farming operation. He said during childhood, his three sisters worked on the family farm.

¶ 18 Plaintiff sought to introduce the June 2010 discovery deposition of Kristine Freshour into evidence as an admission. She referred the trial court to the portion of the deposition where Freshour described the conversation she had with Karin after the wills were executed in 2001. In particular, in her deposition, Freshour said: "She told me in very general terms and it was just a couple sentences. She said where the land was going to among us four children and that a trust was set up for [plaintiff]." Plaintiff claimed this statement was an "[e]videntiary admission, [and she was] not seeking to make it judicial." The court asked plaintiff to explain what she was trying to prove with the admission. Plaintiff's counsel stated: "That their intent was to leave a trust for [plaintiff], that they agreed, and to put in their wills a trust for [plaintiff] and this is after the will, Karin is telling Kristine what they did in their wills and Karin believed as did Vernon that they left a trust for [plaintiff]."

¶ 19 The trial court questioned how Karin's statement to Freshour could be considered an admission against Freshour. Counsel explained that plaintiff's position was that Karin's statement to Freshour that she and Vernon intended to create a trust for plaintiff's benefit was against

Freshour's interest because, if true, it would "cut her share of the estate." After considering the parties' arguments, the court concluded that the statement in Freshour's deposition was not an admission against "anybody's interest." Specifically, the court found Freshour's statement was not an evidentiary admission as to Vernon's testamentary intent.

¶ 20 Plaintiff called Freshour as an adverse witness. Counsel asked if it was her belief that her parents had "agreed to leave all the farmland to you and your brother and two sisters and to leave a trust for [plaintiff] in theirs wills?" Freshour said: "I don't know." She recalled the conversation with her mother that she had testified to in her deposition, but said it was a "vague conversation years ago." She recalled that Karin said that Vernon did not want to leave any of the ground to plaintiff because she had not worked on the farm or "[s]omething like that." Plaintiff rested.

¶ 21 Defendants moved for a directed verdict, claiming plaintiff had failed to demonstrate that either Vernon did not understand the contents of his will or he operated under an insane delusion in making his will. The trial court denied defendants' motion.

¶ 22 Defendants presented the testimony of Freshour. She testified that the conversation with Karin regarding the wills was "short" and "vague." Freshour said she was not comfortable with the conversation, so she did not say anything in response or ask any questions. Karin had "just made a couple remarks and that was it." In Freshour's opinion, there was not "much of a relationship" between plaintiff and Vernon. She said they would "talk briefly [but] [t]here wasn't a lot of conversation." She said she inherited other assets from Vernon that were not part of his estate, but plaintiff did not inherit any of those assets. She said there were years when the family would not see plaintiff. Plaintiff chose not to cross-examine Freshour. Defendants rested.

¶ 23 After the close of evidence, plaintiff's counsel asked the trial court to reconsider its

decision regarding Freshour's "admission." Counsel claimed he now believed it was a judicial admission. The court denied plaintiff's motion to reconsider, finding again that Freshour's statement did not constitute an admission. The court also denied defendants' motion for a directed verdict at the close of evidence. After considering arguments of counsel, the court stated as follows:

> "Here's what the evidence shows. The evidence shows that the language in this will as with language in many wills of people having significant property where there are tax considerations and--at work, is language which a great number of attorneys do not understand, let alone laypersons.
>
> *** There is no weight to [Wedwick's] opinion. It does not provide any evidence that is helpful in determining this case.
>
> [None of Dr. Nord's testimony suggests that Vernon] was not capable of understanding or capable of making a will.
>
> * * *
>
> In addition at best, and I understand the plaintiff is not happy with this, at best, all the statement from Karin is is maybe some inference that she might not have understood the difference--I mean this all hinges on the finer point and the argument was attorneys are wordsmiths, well laypersons are not necessarily wordsmiths so to say that her statement to her daughter in a brief conversation that [']we set up a trust for Hazel[']meant that she didn't understand what they did because she should have said [']Hazel only[] or [']Hazel's

descendants,['] that is not the precision we would necessarily require the layperson to articulate. At best, that suggests she might not have understood that it was a trust for Hazel's children, not Hazel. How that relates to Vernon's state of mind or intent is beyond me. And how any of the interested parties saying ['W]e believe that is what they intended['] changes anything is also beyond me.

***

It is clear and maybe unfortunate that the decedent's relationship with his daughter by his first marriage was nowhere near the kind of relationship that apparently he had with the four children of the second marriage. It is--I don't need to know and I'm glad nobody was trying to tell me, but it is obviously unfortunate that at a very important age in Hazel's life, after spending only a year with her dad, she's shipped off to Salem Children's Home. But the evidence before me is that thereafter there was apparently an extended period of time where there was little or no relationship and then only a sporadic relationship afterwards.

Again, in terms of the precision of language, the fact that Vernon may have made some statement about Hazel never worked on the farm, that you have to put in the context apparently the other children spent significantly more time[,] at least[,] living on the farm and working with him than she did. So to try to hang one's hat on

> those very unpersuasive arguments that the language is too complicated for some individual I never knew or saw to understand, that because we said [']trust for Hazel[] that means we didn't know what we were doing, or because we said [']Hazel didn't work on the farm[] we didn't know what we were doing, or because[,] for example[,] as Dr. Nord says in one part [']I think if this has been read to him and he had read this will,[] that that means that the doctor says he both had to have it read to him and had to read it himself, there is no way that proof meets the burden that plaintiff has in this case by a preponderance of the evidence to show that this will is not valid.
>
> The plaintiff's complaint is denied. Judgment for the defendants in this case."

¶ 24 In May 2011, the trial court denied plaintiff's posttrial motion for a judgment notwithstanding the verdict. This appeal followed.

¶ 25 II. ANALYSIS

¶ 26 Plaintiff appeals the trial court's judgment, claiming the preponderance of the evidence supported a judgment in her favor. "A motion for a judgment notwithstanding the verdict should be granted only in those cases in which all of the evidence, when viewed in its aspect most favorable to the opponent, so overwhelmingly favors the movant that no contrary verdict based on that evidence could ever stand." *Cardiel v. Warren*, 191 Ill. App. 3d 816, 821 (1989). An appellate court reviews *de novo* a trial court's decision denying a party's motion for judgment notwithstanding the verdict. *Jablonski v. Ford Motor Co.*, 2011 IL 110096 ¶ 88, 955 N.E.2d 1138, 1155 (2011).

Because plaintiff does not meet her burden of proving error, we affirm the court's judgment.

¶ 27 According to plaintiff, the dispositive issue in this case is whether Freshour's statement was an admission. Admissions come in two varieties: judicial and evidentiary. A judicial admission must be deliberate testimony relating to a concrete fact, and not a matter of opinion, estimate, appearance, inference or uncertain summary. *A. H. Sollinger Construction Co., Inc. v. Illinois Building Authority*, 5 Ill. App. 3d 554, 562 (1972). It cannot be contradicted. "A judicial admission is the highest and best type of evidence which dispenses with the need for proof of the facts submitted." *Burns v. Michelotti*, 237 Ill. App. 3d 923, 932 (1992). "Included in this category are admissions made in pleadings, formal admissions made in open court, stipulations, and admissions pursuant to requests to admit." *Brummet v. Farel*, 217 Ill. App. 3d 264, 267 (1991).

¶ 28 An evidentiary admission, on the other hand, may be controverted or explained. *Green v. Jackson*, 289 Ill. App. 3d 1001, 1008 (1997). Any statement, oral or written, voluntarily made by a party to an action that contradicts the position taken by that party may be introduced into evidence as an admission against interest if it is pertinent to the issues of the case. *Korleski v. Needham*, 77 Ill. App. 2d 328, 334 (1966). Further, when relevant to issues in the case, admissions by a party are admissible as substantive evidence of the truth of the statements made or of the existence of any facts which they have a tendency to establish. *Cardiel*, 191 Ill. App. 3d at 821 (1989). Though made out of court, an evidentiary admission is not hearsay if:

> "The statement is offered against a party and is
>
> (A) the party's own statement, in either an individual or a representative capacity, or
>
> (B) a statement of which the party has

manifested an adoption or belief in its truth, or

(C) a statement by a person authorized by the party to make a statement concerning the subject, or

(D) a statement by the party's agent or servant concerning a matter within the scope of the agency or employment, made during the existence of the relationship, or

(E) a statement by a coconspirator of a party during the course and in furtherance of the conspiracy, or

(F) a statement by a person, or a person on behalf of an entity, in privity with the party or jointly interested with the party." Ill. R. Evid. 801(d)(2) (eff. January 1, 2011). Ill. R. Evid. 801(d)(2) (eff. Jan. 1, 2011).

¶ 29 Freshour's statement cannot be classified as an admission. It certainly does not rise to the level of a judicial admission, as it is subject to interpretation as it relates to Vernon's intent, and it can be controverted. Nor, for two reasons, does it constitute an evidentiary admission. First, Karin's statement, as relayed through Freshour, does not admit anything tending to assist plaintiff in her claim against the estate. The fact that Karin told Freshour that, according to her and Vernon's will, the four children would be getting the farmland, while plaintiff would receive a cash gift in a trust, does not tend to prove (1) that Vernon did not understand the contents of his will, or (2) that

Vernon did not intend to disinherit plaintiff.

¶ 30 It is reasonable to assume that Karin heard Bach mention a trust when the conversation among her, Vernon, and Bach turned to the subject matter of what plaintiff would receive from Vernon's estate. Karin's statement to Freshour does not indicate that she knew or certainly believed plaintiff would personally be receiving the bequest. Karin may have thought the establishment of a trust, which included plaintiff's name in the title of the trust, would somehow benefit plaintiff personally, or at least benefit plaintiff's descendants. It seems apparent from her statement to Freshour, that Karin knew plaintiff would not receive the same treatment in the will as Vernon's other children. However, it does not prove that Karin told Freshour that Vernon certainly intended to leave something for plaintiff personally from his estate. Freshour's "vague" recollection of Karin's statement to her was not an admission of any fact, let alone any fact that would tend to prove plaintiff's cause of action regarding Vernon's capacity.

¶ 31 Second, there is no evidence in the record that Freshour was adopting Karin's statement as her own. In other words, Freshour did not testify, in effect, that Vernon's intent was to create a trust for plaintiff. Freshour was merely reiterating Karin's statement to her after Karin and Vernon had executed their wills. The fact that Freshour is a coexecutor does not alter this analysis. Freshour did not claim to be making a statement on behalf of Vernon's estate. Her reiteration of Karin's statement to her was not meant as proof, from her perspective, of Vernon's testamentary intent.

¶ 32 Based on the above, it is apparent that Freshour's statement does not constitute an admission. We must now determine whether the statement is otherwise admissible and, if so, whether it constitutes evidence sufficient to reverse the trial court's judgment. Generally speaking,

all relevant evidence is admissible, except as otherwise provided by rules of evidence. Ill. R. Evid. 402 (eff. Jan. 1, 2011). One such rule is the hearsay rule: Any out-of-court statement offered to prove the truth of the matter asserted is inadmissible hearsay unless it falls within an exception to the hearsay rule. *People v. Lawler,* 142 Ill. 2d 548, 557 (1991).

¶ 33 Defendants argue that Freshour's statement is not relevant. We disagree. Though her statement, as explained above, does not prove Vernon's testamentary intent to establish a trust for plaintiff personally, it does tend to prove that Vernon intended to treat plaintiff differently than his four other children. By telling Freshour that the farmland would be divided among the four children with a trust being created for plaintiff, Karin, in effect, informed Freshour that Vernon intended to leave plaintiff something different than what he intended for his other four children.

¶ 34 Although this evidence is relevant, again, it does not tend to prove what plaintiff insists it proves; that is, it does not prove that Vernon intended to establish a trust to benefit plaintiff personally. However, in this vein, plaintiff introduced Freshour's deposition testimony of Karin's out-of-court statement for the truth of the matter. She introduced the evidence to demonstrate that Vernon intended to provide for plaintiff in his will. Karin's statement, if taken as true, proves, according to plaintiff, that Vernon did not understand the provisions of his will as it was written, given the fact that he had intended to provide for plaintiff personally. Though plaintiff claims this evidence should have been characterized as an admission and, as a result, not hearsay, as explained above, we find that is not the case. This evidence is nothing more than hearsay and no exception applies to make Karin's statement, as testified to by Freshour, admissible.

¶ 35 III. CONCLUSION

¶ 36 Based on this record, we find the trial court did not err in denying plaintiff's claims

and entering a judgment in favor of defendants. We find plaintiff failed to sustain her burden of proof that Vernon's will did not reflect his true testamentary intent or that his capacity was diminished.

¶ 37 Affirmed.